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No. 80-1016

In the Supreme Court of the United States

OCTOBER TERM, 1980

BOISE CASCADE CORPORATION,

Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY; SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY and UNITED STATES OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can the General Right of Way Act of March 3, 1875, 18 Stat. 482, 43 U.S.C. §§ 934-939 be applied to grant a right of way to a railroad constructed prior to its passage?

2. Is a railroad entitled to a 200-foot right of way under the Act on a line constructed in 1873 where the required filings submitted after enactment in 1875 designated a line different than the line previously constructed, indicated that the line was to be constructed in the future and have remained uncorrected for 105 years?

3. Is summary judgment appropriate where there is a genuine issue of material fact regarding the location of the right of way granted pursuant to administrative action under the Act?

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Boise Cascade Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on July 24, 1980.

OPINION BELOW

The opinion of the court of appeals is reported at 630 F.2d 720. A copy of the opinion is attached

as Appendix A. The order of the United States District Court for the District of Utah granting summary judgment to respondents is reported at 454 F. Supp. 531. A copy of that order is attached as Appendix B. The district court's judgment and decree is not reported; a copy is attached as Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on July 24, 1980.[1] A timely petition for rehearing *in banc* was denied on September 23, 1980, *see* Appendices D (denying rehearing) and E (denying rehearing *in banc*) attached, and this petition for certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The General Right of Way Act of March 3, 1875, 18 Stat. 482, 43 U.S.C. §§ 934-939 (the Act), provides in pertinent part:

> Section 934 *Right-of-way through public lands granted to railroads*
>
> The right of way through the public lands of the United States is granted to any railroad company duly organized under the laws of any State

[1] On May 8, 1980, the court of appeals issued its initial opinion and judgment in this matter. Boise Cascade petitioned the court to recall the mandate in the case and for leave to file a petition for rehearing out of time to allow the court to correct errors in that opinion. On July 24, 1980, the court issued an order recalling the mandate, withdrawing the opinion filed May 8, filing a new opinion and permitting the parties the usual time from the new filing to petition for rehearing. Boise Cascade obtained an extension of that time and thereafter filed a timely petition for rehearing in banc on August 22, 1980.

or Territory . . . which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of 100 feet of each side of the central line of said road . . . .

. . . .

Section 937. *Filing profile of road; forfeiture of rights*

Any railroad company desiring to secure the benefits of sections 934-939 of this title shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the officer, as the Secretary of the Interior may designate, of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such land over which such right of ways shall pass shall be disposed of subject to such right of way: *Provided*, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

. . . .

The Act of February 25, 1909, 35 Stat. 647, 43 U.S.C. § 940, provides in pertinent part:

Section 940. *Forfeiture of rights where railroad not constructed in five years after location*

Each and every grant of right of way made prior to February 25, 1909, to any railroad corporation under section 934-939 of this title where such railroad had not been constructed in the period of five years next following the location of said road, or any section thereof, and on that

> date expired, is declared forfeited to the United States, to the extent of any portion of such located line then remaining unconstructed, and the United States resumes the full title to the lands covered thereby free and dischaged from such easement, and the forfeiture declared shall, without need of further assurance or conveyance, inure to the benefit of any owner or owners of land conveyed by the United States prior to such date subject to any such grant of right of way or station grounds . . . .

A complete copy of each of the above acts and of relevant portions of the Fundamental Enabling Act of July 16, 1894, 28 Stat. 107, is attached as Appendix F.

STATEMENT OF THE CASE

This quiet title action was commenced in 1976 after a dispute developed between Boise Cascade and Union Pacific Railroad Company regarding title to a strip of land in Section 16, Township 6 South, Range 2 East, Utah Country, Utah.

In 1871 the Railroad commenced construction of its proposed 73 mile road and by November of 1873 had completed the portion at issue here.[2] (R. 238) In

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[2] The Utah Southern Railroad Company was organized in January of 1871 to construct a railroad line from Salt Lake City to Payson, Utah. The Articles of Incorporation were amended in 1877 and 1879 to extend the road 29 miles further south. Title to the road, which was completed in 1879, passed through a number of reorganizations and conveyances until 1903 when it was conveyed to its current owner, respondent San Pedro, Los Angeles & Salt Lake Railroad Company. Since 1936, Union Pacific has leased the road from its owner. For ease of reference and because there is no dispute that respondents stand in the same position as their predecessors, each and all of the railroads constructing, owning or leasing the line in question will be referred to in this petition as the Railroad.

September of 1875, following passage of the Act, the Railroad filed its articles of incorporation and a profile map with the Secretary of the Interior (Secretary). The Secretary approved the map and filed the articles on September 28, 1875.

Based upon these filings and the Secretary's approval of them, the Railroad claims a 100-foot right of way on either side of the center line of its track constructed in 1873.

Boise Cascade is the successor in interest of the grantee of a patent by the State of Utah. Utah claimed title to Section 16 as a school section conveyed to it under the Fundamental Enabling Act of July 16, 1894, 28 Stat. 107.[3]

The Railroad has not utilized its entire claimed 200-foot right of way for railroad purposes. For more than 20 years, the Railroad had maintained fences on either side of the track approximately 33 feet from its center line. (R. 46) Boise Cascade's property is bounded on the east by the fence located 33 feet west of the track. The 67-foot strip in dispute is the land located between the fence and the claimed 100-foot right of way on the west side of the track. Boise Cascade has made valuable improvements on this strip. (R. 159)

There is a dispute in the record whether the line indicated on the profile map filed by the Railroad and approved by the Secretary corresponds to the line con-

[3] Utah's title to Section 16 was confirmed in Patent No. 43-65-0183 issued by the United States on April 24, 1965.

structed in 1873. Boise Cascade introduced a certified plat prepared by a licensed surveyor establishing that the rail line shown on the profile map is approximately 430 feet east of the line built in 1873. (R. 115) The Railroad has refused to admit that the plat is accurate (R. 134) but has acknowledged that it cannot admit or deny that the line on the profile map is located more than 100 feet east of the present center line of the trackage. (R. 41)

It is not disputed that the due proofs of organization, consisting of verifications attached to the Railroad's articles of incorporation, submitted to the Secretary pursuant to the requirements of the Act indicated that the Railroad, on August 17, 1875, was "fully authorized to proceed with the construction of its road."[4]

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals warrants review by this Court.

1. THE DECISION GRANTS A WINDFALL TO THE RAILROAD CONTRARY TO THE INTENT OF THE ACT AND IN CONFLICT WITH THIS COURT'S INTERPRETATION OF THE INTENT OF THE ACT.

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[4] The copy of the articles of incorporation with verifications by the Auditor of Public Accounts for Utah Territory dated August 17, 1875 which are in the record were actually filed with the Secretary as part of "amended due proofs" in 1880 after the length of the road was extended. The last page of the verification (R. 217) is reproduced in its entirety and attached as Appendix G. Because the verifications are dated August 17, 1875, approximately one month prior to the September 28, 1875 approval of the Secretary, it is presumed that these articles and verifications were part of the Railroad's original filing.

The court of appeals has applied the Act to a railroad constructed prior to its passage contrary to congressional intent. It has further liberally construed the Act and the Secretary's actions pursuant to it contrary to the rationale of *United States v. Denver & Rio Grande Ry. Co.*, 150 U.S. 1 (1893) and *Great Northern Ry. Co. v. United States*, 315 U.S. 262 (1942) and based upon an erroneous extension of *Jamestown & Northern R. Co. v. Jones*, 177 U.S. 125 (1900).

A. *The Act was not intended to apply to a road constructed prior to its passage.*

In its opinion, the court of appeals concludes that a railroad company, by simply filing its articles of incorporation and proofs of organization with the Secretary after passage of the Act, could receive the generous benefits of the Act for any line constructed prior to its passage. That conclusion is in conflict with the purpose of the Act.

In *United States v. Denver & Rio Grande Ry. Co.*, *supra*, 150 U.S. at 8, the Court unequivocally stated that the purpose of the Act was to promote the construction of new rail lines in the West. The Court said:

> The general nature and purpose of the Act of 1875 were manifestly to promote the building of railroads through the immense public domain remaining unsettled and undeveloped at the time of its passage. . . . To induce the investment of capital in the construction of railroads through the public domain, Congress had previously granted special rights, such as were conferred upon the defendant by the Act of 1872; but, by

> this Act of 1875, a general offer was made to any and all railroad companies . . . provided such railway company should comply with the provisions of section four of the Act.

See also, Great Northern Ry. Co. v. United States, supra, 315 U.S. at 274.

That the Act was never intended to apply to railroads constructed prior to its passage is further evidenced by its legislative history and early administrative interpretation.

In 1873, Senator Clayton submitted a resolution which provided that the Committee on Railroads be instructed to consider reporting a bill which would provide a general system of railroad incorporation "whereby persons may . . . become bodies corporate . . . for the purposes of constructing . . . railroads . . . ." Resolution of December 8, 1873, 43d Cong. 1st Sess., Sen. Misc. Doc. 12 (Serial 1584). The bill reported out and passed provided for both the incorporation of railroad companies in the Territories and the grant of rights of way to them over the public lands. Cong. Rec. 43d Cong. 1st Sess. Vol. 2, pt. 3, 2896-98 and pt. 4, 3036-42 (1874). The House substituted an act that provided only for the grant of rights of way. Cong. Rec. 43d Cong. 2d Sess. Vol. 3, pt. 1, 404 (1875). A conference committee recommended the House bill with minor amendments and the report passed both houses. Cong. Rec. 43d Cong. 2d Sess. Vol. 3, pt. 3, 2070, 2210 and 2217 (1875).

The congressional debates on the bills make it plain that its purpose was to encourage new construction.[5] Given the foregoing, the conclusion is inescapable that Congress did not intend the Act to bestow broad rights of way for rail lines already constructed at the time of its passage. This would in no way serve the purpose of encouraging new construction.

The contemporaneous administrative interpretation of the Act also is pertinent. *Great Northern Ry. Co., supra,* 315 U.S. at 275. In the first Circular Instructions on the Act, issued June 30, 1875, the Secretary set forth regulations on the "due proofs of organization"

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[5] For example, Senator Stewart of Nevada, the sponsor of the bill in the Senate and a member of the conference committee, stated:

> [A]nd I say God speed to the men who will build railroads there with their own money, as this bill proposes, and enrich the nation.

Cong. Rec. 43 Cong. 1st Sess. Vol. 2, pt. 4, 3037 (1874). Senator Hager of California objected to an amendment to the bill which would have allowed a territory, when admitted as a state, to revoke the railroad's franchise. He said:

> There is not a sufficient guarantee . . . to encourage the investment of money in this kind of enterprise when this limitation is attached to it . . . . For this reason I think the law would be inoperative. It would be a useless law upon our statute-books with that provision in it. No man would invest his money in a railroad enterprise when the object of the law under which he claimed to be incorporated could be changed in the manner proposed.

Id. Congressman Townsend, the sponsor of the House Bill and a member of the conference committee, in response to a proposed amendment that would have deleted the right of railroads to take material and timber from adjacent public lands, said:

> [I]f they are willing to risk their capital out in the Territories, they ought to have some little show in order to enable them to build these roads.

Cong. Rec. 43d Cong. 2d Sess. Vol. 3, pt. 1, 404 (1875).

required to be filed under Section 1 of the Act. He instructed that the filing should include:

> The official statement . . . that the company is fully authorized to proceed with the construction of the road . . . .

2 Copp's Public Land Laws 815, 816 (1882). An identical statement is contained in every subsequent set of regulations issued by the Secretary.[6] Two of these subsequent regulations expressly provided that:

> the requirements of the law regarding the filing of the proper papers and maps are conditions precedent to the obtainment of the right to construct a railroad over the public lands . . . .

2 Copp's Public Land Laws 818 (1882); *accord*, 12 Land Decisions 426 (1891).

Decisions of the Secretary in the period immediately following the Act also considered it applicable only to railroads constructed after its passage. For example, in *Perkins v. Central Pacific R.R. Co.*, 1 Land Decisions 336 (1882), the Secretary, referring generally to land and right of way grants to railroads, said:

> These grants were not in consideration of any debt or obligation on the part of the United States to the grantee. They were bounties bestowed on the railroad company by the United

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[6] Circular Instructions of March 9, 1878, 2 Copp's Public Land Laws 816, 817 (1882); Circular of January 13, 1888, 12 Land Decisions 423, 425 (1891); Regulations of November 4, 1898, 27 Land Decisions 623, 625 (1898); Regulations of February 11, 1904, 32 Land Decisions 481, 485 (1904); Regulations of May 21, 1909, 37 Land Decisions 787, 790 (1909).

> States to encourage the building of the road, and in consideration thereof the company undertook to build.

1 Land Decisions at 341. *See also, North Wisconsin Ry. Co.*, Dec. Nov. 17, 1879, 2 Copp's Public Land Laws 823 (1882).

In support of its conclusion that the Act was intended to have retroactive application, the court relied on one case, *Rio Grande Western Ry. Co. v. Stringham*, 38 Utah 113, 110 Pac. 868 (1910), *aff'd* 239 U.S. 44 (1915), overruled on other grounds by *Great Northern Ry. Co., supra*, 315 U.S. at 279. In that case the Utah Supreme Court held, *inter alia*, based on the Secretary's approval of a profile map of a road constructed in 1873, that the Act did apply to a railroad constructed prior to its passage.

The court of appeals erred in assuming that this Court's affirmance of the Utah court's decision was a ratification of the portion of the holding relating to retroactivity. The appeal to the Supreme Court was taken only by the railroad, no other party appearing,[7] on a wholly different issue. The Utah court had ruled that the railroad had title to a right of way. The railroad claimed title in fee simple by virtue of the Act, but the Utah court had declined to rule on that issue. The railroad appealed to this Court in hopes of prevailing in its contention that it held a fee interest. The

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[7] In Great Northern Ry. Co., supra, the Court in reversing Stringham alluded to the problems that affect a court's decision when only one interest appears. 315 U.S. at 279.

Court, in affirming the decision below, considered only the nature of the railroad's interest, assuming it had one, and did not reconsider whether the lower court had properly found it to have had a right of way under the Act.

It is submitted that the Tenth Circuit's decision is contrary to Congress' intent and that its reliance on *Rio Grande Western* is unavailing.

B. *The Secretary's action in approving the Railroad's profile map and due proofs of organization should be construed in harmony with the intent of the Act.*

A government land grant is to be construed strictly against the grantee except where such a construction negates actions taken in reliance on inducements offered by the grant. *United States v. Denver & Rio Grande Ry. Co., supra,* 150 U.S. at 14. Here there was no action taken by the Railroad in reliance on the Act; its actions were taken before the Act existed. Therefore, the Act and the Secretary's actions under it should be strictly interpreted against the Railroad.

In 1875, the Railroad filed a profile map designating a rail line which was yet to be built and which had a different location than the line for which it now claims a 200-foot right of way under the Act.[8] It also filed "due proofs of organization" which stated that, as

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[8] Inasmuch as the factual dispute on the accuracy of the profile map was held immaterial by the lower courts in granting and affirming the grant of summary judgment to the Railroad, it is appropriate in this petition to resolve that dispute in the light most favorable to Boise Cascade.

of August 17, 1875, it was "fully authorized to proceed with the construction of its road." (App. G) Under these circumstances, a reasonable construction of the Secretary's action of September 28, 1875 accepting the articles and due proofs and approving the profile map is that a right of way was granted on a line yet to be built on the route indicated on the profile map.

It is immaterial whether the Secretary had knowledge of the existing line. First, he would not have understood the Act to apply to a road constructed prior to its passage and therefore would have considered the discrepancy between the profile map and the existing line to be intentional. Second, nothing in the Railroad's 1875 filings indicated that the right of way was sought for a line previously constructed. Third, it was common practice for railroads to make amended filings when a new line or branch line was to be constructed. *Great Northern Ry. Co. v. Steinke*, 261 U.S. 119, 125 (1925).

The construction of the Secretary's action proposed in this petition is in harmony with the intent of the Act and is therefore preferred to that of the court of appeals. *United Telecommunications, Inc. v. Commissioner of Internal Revenue*, 589 F.2d 1383, 1390 (10th Cir. 1978). Furthermore, it would not result in an undeserved windfall to the Railroad—the right of way granted would have been forfeited under 43 U.S.C. §§ 937 and 940 by failure to construct, and it does not require the unwarranted extension of *Jamestown & Northern R. Co. v. Jones, supra*, 177 U.S. 125, which the court of appeals was forced to make.

To find that the dispute regarding the inaccuracy of the profile map was immateral, the court cited *Jamestown* for the proposition that the filing of an inaccurate profile map following construction prior to the Act had no effect on a right of way granted under the Act. The unambiguous language of Section 4 of the Act (43 U.S.C. § 937) is contrary to this proposition and *Jamestown* does not support it.

In *Jamestown* and related cases,[9] the question presented was when the grant attached relative to an intervening claim. In each case, the railroad undertook construction of a line after the Act was passed and filed an accurate profile map within a few months. During the short time between construction and filing, approval or administrative processing of the map, an intervening claim arose. In these circumstances, the Court and Secretary have held that construction after the Act provided fixity of location sufficient to perfect the grant against other claimants.

In *Cary v. Chicago, S.P.M.&O. Ry. Co.*, 3 Land Decisions 428 (1885), conflicting claims arose on indemnity lands which had been selected by the railroad under a special act because of the inaccuracy of a map filed by the railroad pursuant to the act. The Secretary said:

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[9] **Stalker v. Oregon Short Line R. Co., 225 U.S. 142 (1912); Washington & Idaho R. Co. v. Coeur D'Alene Ry. & N. Co., 160 U.S. 77 (1895); Phoenix & Eastern R. Co. v. Arizona Eastern R. Co., 9 Ariz. 434, 84 Pac. 1097 (Ariz. 1906), appeal dismissed 207 U.S. 601 (1907); Dakota Central R. Co. v. Downey, 8 Land Decisions 115 (1889).**

> It therefore behooved the company to see to it in the first instance that such patent discrepance [sic] was either explained or rectified before any adverse claim had intervened, since it is not competent for the company to assert a paramount right in the premises by virtue of their [sic] laches.

3 Land Decisions at 429.

If it is assumed that the Act could be applied to lines constructed prior to 1875, the requirement of Section 4 that an accurate profile map be filed is more critical. One knowing that a line was constructed prior to passage of the Act would have no reason to assume that the Act applied to the line unless a map, which designated the line as one to receive the benefits of the Act, was on file. Although it is submitted that the holding of *Rio Grande Western Ry. Co. v. Stringham, supra,* 38 Utah 113, 110 Pac. 868, is in error on the issue of retroactivity of the Act, at least in that case an accurate profile map was filed by the railroad.

Here, the Railroad filed an inaccurate profile map and for over 100 years has allowed this error to go uncorrected. It has used only a 66-foot right of way and has allowed others to use, purchase and sell, without objection, the 134-foot balance of the right of way it now claims. Even now, the Railroad does not claim that it needs or intends to use the 200-foot right of way for railroad purposes. *United States v. Union Pacific R. Co.,* 353 U.S. 112, 119 (1957); *Great Northern Ry. Co. v. United States, supra,* 315 U.S. at 277. Rather, it apparently intends to profit from the reliance of others on its inaccurate map.

The opinion of the Tenth Circuit should be reversed to prevent the Railroad from receiving an unintended and inequitable windfall.

C. *If the Secretary did intend to grant a right of way in the line constructed in 1873, his action is void.*

In its opinion, the court of appeals implies that the Railroad has a 200-foot right of way by virtue of the Act because the actions of the Secretary are binding and cannot be reviewed in a collateral proceeding even if contrary to the intent of the Act. If the Secretary's intent was to approve a right of way in the road constructed in 1873, the court's conclusion is erroneous.

It is a fundamental principle that actions by an administrator which confer benefits not authorized by law are not binding. *Federal Crop Insurance Corp. v. Merrill,* 332 U.S. 380, 384 (1947). Rights in land conveyed by administrative action may be cancelled if the administrator has acted in violation of regulations or law. *Gray v. Johnson,* 395 F.2d 533, 537 (10th Cir.), *cert. den.* 392 U.S. 906 (1968). Where the actions of the administrator are plainly *ultra vires,* recognition of their nullity is not an attempted invalidation of them but is simply a recognition that they were ineffectual. *Chicago & North Western Ry. Co. v. Continental Oil Co.,* 253 F.2d 468, 472 (10th Cir. 1958).

The Act did not authorize or contemplate the grant of rights of way to railroad companies for lines constructed prior to March 3, 1875. Any action or attempted action by the Secretary which purported to

grant a right of way to the Railroad on its 1873 line would have been *ultra vires* and void. The Court should reverse the decision of the court of appeals.

2. The Decision Below Has Clouded the Title to Land of Thousands of Private Individuals.

In conjunction with and following the building of the transcontinental railroad in the late 1860's and early 1870's, western railroads began to construct a complete system of rail lines between the more populous regions of the West. Developing mining and agricultural industries spurred competition among the railroads to occupy the most important economic districts.[10] From 1870 to 1880, 40,000 miles of new rail lines were built, much of it in the western territories and states.[11]

Prior to 1870, most of this building was induced by lavish government land grants to the railroads. *Leo Sheep Co. v. United States*, 440 U.S. 668, 673 (1979); *Great Northern Ry. Co. v. United States, supra*, 315 U.S. at 273. However, public opinion rose against these grants and by 1872 the House of Representatives had passed a resolution declaring its disfavor with the subsidies. Cong. Globe, 42d Cong. 2d Sess. 1585 (1872). *See also, Great Northern Ry. Co., supra*, 315 U.S. at 273-74. A variety of special acts were passed granting specific rights of way to individual railroads, some with lesser grants than those provided in

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[10] R. E. Reigel, **The Story of the Western Railroads, 95-110 (1926).**

[11] C. J. Corliss, **American Railroads Their Growth and Development (1945).**

the Act. *E.g.*, Act of June 20, 1874, 18 Stat. 130 [granting a 50-foot right of way on each side of the road to a narrow gauge railroad in California]. Other railroads were built without the inducement of any federal grant. In fact, the Railroad's construction of the line in question here without government subsidy was a matter of pride to residents of Utah Territory.[12]

Undoubtedly, many hundreds of miles of other railroads, in addition to the 73 miles of the Railroad involved in this case, were constructed on the public domain prior to the passage of the Act and would have benefitted from a retroactive application of the Act. Under the court of appeals decision in this case, these railroads, to avail themselves of the benefits of the Act, would have been required only to file articles of incorporation and due proofs of organization with the Secretary. Whether they filed profile maps of the lines already built or profile maps of other lines or no profile maps at all would have been immaterial to their receipt of a right of way under the Act on the lines previously constructed. Moreover, a railroad which received a grant under the Act on a line already constructed could not divest itself of it voluntarily or involuntarily. *Northern Pacific Ry. Co. v. Townsend,* 190 U.S. 267 (1903); *Himonas v. Denver & Rio Grande W. R. Co.*, 179 F.2d 171 (10th Cir. 1949); *Allard Cattle Co. v. Colorado & Southern Ry. Co.*, 516 P.2d 123, *aff'd* 530 P.2d 503 (Colo. 1974).

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[12] R. F. Thorum, **Railroad Development in Utah, 1869-1879, 25, 74 (1936).**

Certainly, some of the railroads constructing roads prior to 1875 made the requisite filings at some time to avail themselves of a right of way for new lines or extensions. Inasmuch as the Act only specifies a time requirement for the filing of a profile map[13] and the filing of a profile map has been declared by the lower court here to be unnecessary for a road constructed prior to 1875, these filings could presumably have occurred at anytime until October 21, 1976, when the Act was repealed with respect to further grants. Pub. L. 94-579, Title VII, § 706(a), 90 Stat. 2793.

Thus, the court of appeals' liberal construction of the Act has resulted in the clouding of titles of thousands of private individuals who have acquired proprietary interests in lands lying within 100 feet of these railroad tracks constructed prior to 1875 on the public domain and upon which the railroads may have never even intended to acquire any right of way. The reliance of these property owners and their predecessors on a fenced or used right of way of lesser dimensions, possibly for in excess of 100 years, has been negated by by the railroads' filings of their articles of incorporation. Ironically, these filings could have been made decades after that reliance commenced and for purposes unrelated to the property, title to which is clouded by the filings.

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[13] Profile maps were required to be filed within 12 months of location of any section of the line. 43 U.S.C. 1937. Here the line was located in the fall of 1873 but no profile map was filed until August or September of 1875. Because of the court's holding that it was unnecessary to file a profile map, the timeliness of the Railroad's filing was not an issue below.

The decision is erroneous and should be reversed to prevent this widespread disruption of property rights.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

GREGORY B. MONSON,
Counsel of Record

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Attorneys for Petitioner

December 1980

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 78-1462

Filed July 24, 1980

BOISE CASCADE CORPORATION,
Appellant,

v.

UNION PACIFIC RAILROAD COMPANY; SAN PEDRO, LOS ANGELES AND SALT LAKE RAILROAD COMPANY; and THE UNITED STATES OF AMERICA,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

(D.C. No. C-76-374)

Robert D. Maack (Harry D. Pugsley and Watkiss & Campbell, on the briefs) for Appellant.

J. Clare Williams and Robert L. Klarquist (Anthony C. Liotta, Deputy Assistant Attorney General, Ronald L. Rencher, United States Attorney and Charles E. Biblowit, Attorney, Department of Justice, on the briefs) for Appellees.

Before HOLLOWAY, BREITENSTEIN and DOYLE, Circuit Judges.

BREITENSTEIN, Circuit Judge.

This quiet title dispute presents conflicting claims to a strip of land in Utah claimed by Railroads under a federal right-of-way grant and by a lumber company under mesne conveyances from the State of Utah. The United States is joined because of a possible reversionary interest. The district court granted summary judgment for the defendants. See Boise Cascade Corp. v. Union Pacific R.R.Co., D. Utah, 454 F.Supp. 531. We affirm.

The land is in Section 16, T. 6 South, R. 2 East, Utah County, Utah. Plaintiff-appellant Boise Cascade is the successor in interest of the grantee of a patent by Utah, which claimed ownership of Section 16 as a school section to which it had received title under the Fundamental Enabling Act of July 16, 1894, 28 Stat. 107.

In 1873 Southern Railroad Company constructed a railroad line across part of Section 16. By a series of conveyances defendant-appellee San Pedro, Los Angeles & Salt Lake Railroad Company obtained ownership of the line and later leased it to the defendant-appellee Union Pacific R. Co. The Railroads claim title under the General Right of Way Act of March 3 1875, 18 Stat. 482, 43 U.S.C. § 934. They say that they are entitled to a strip 100 feet on each side of the track. The Railroads put up a fence 33 feet on each side of the track center line. The dispute is over a strip between the fence and 67 feet westerly from it. Boise Cascade built a lumber yard and made other improvements within the 67 foot strip.

The 1875 Right of Way Act provides, 43 U.S.C. § 934:

> "The right of way through the public lands of the United States is granted to any railroad company * * * which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road."

It is undisputed that the constructing Railroad filed its articles of incorporation and proofs of organization in 1875 and that construction of the tracks was completed in 1873.

The 1875 Act also provides, 43 U.S.C. § 937, that a railroad desiring to take advantage of § 934 shall within a specified time file in the appropriate land office "a profile of its road." Boise Cascade claims that the Railroad in 1875 filed a profile map which shows a center line about 400 feet easterly of the center line of the constructed track. Boise Cascade argues that the profile map controls and the Railroads have only an easement over the land covered by the track with 33 feet on each side as enclosed by the fence.

The Railroads deny the Boise Cascade claim that the profile map designates a center line other than the actual track. This factual dispute does not prevent a summary judgment if, as a matter of law, the Railroads prevail. The district court held that actual construction of the track plus the filing of the specified documents perfected the Railroads' right of way to the extent of 100 feet on each side of the center line of the track.

In Jamestown and Northern R. Co. v. Jones, 177 U.S. 125, 130, the Supreme Court rejected a state court's conclusion that the "right of way only became definitely located by the filing of a profile map," and adopted the Interior Department's rulings that "the right of way may be definitely located by the actual construction of the road." The Court said, Id. at 131:

> "The ruling gives a practical operation to the statute, and we think is correct. It enables the railroad company to secure the grant by an actual construction of its road, or in advance of construction by filing a map as provided in section four. Actual construction is certainly unmistakable evidence and notice of appropriation"

See also Minneapolis, St. Paul &c Ry. Co. v. Doughty, 208 U.S. 251, 258-259; Noble v. Oklahoma City, 297 U.S. 481, 494; and United States v. Southern Pacific Trans. Co., 9 Cir., 543 F.2d 676, 697.

Boise Cascade seeks to distinguish Jamestown by the claim that the General Right of Way Act of 1875 operates prospectively and applies only to actual construction after the passage of the Act. In Jamestown the raiload was constructed in 1882, after the Act. In the instant case the construction was in 1873, before the Act. The difference is unimportant. Actual construction is notice of location whether it occurs before or after the Act. By accepting the articles of incorporation, the proofs of organization, and the profile map after the passage of the Act, the Secretary of Interior necessarily determined that the Act applied. Rio Grande Western Ry. Co. v. Stringham, Utah, 110 Pac. 868,

871, affirmed 239 U.S. 44, reversed on another ground by Great Northern Ry. Co. v. United States, 315 U.S. 262, 279. The actions of the Secretary may not be reviewed in this collateral proceeding. We are convinced that the 1875 Act applies to determine the rights of the parties.

Boise Cascade also says that Jamestown applies only to unsurveyed lands, and Section 16, involved here, was surveyed when the Railroads' right of way is claimed to have attached. In Jamestown the Court noted that the Interior Department decisions dealt with surveyed land and "the only difference which the act of Congress makes between surveyed and unsurveyed land is the provision in section four for filing the profile of the road." 177 U.S. at 132.

Boise Cascade relies on several state court decisions. Two of these, Chicago K. & N. Ry. Co. v. Van Cleave, Kan., 33 Pac. 472, and Kinion v. Kansas City, Ft. S.&M.R. Co., Mo., 24 S.W. 636, were decided before Jamestown. Minneapolis, St. Paul &c Ry. Co., supra, 208 U.S. at 258, noted the split among lower courts before Jamestown. Phoenix & E. R. Co. v. Arizona Eastern R. Co., Ariz., 84 Pac. 1097, 1099, appeal dismissed, 207 U.S. 601, supports the Railroads as it recognizes that rights may be acquired by actual construction even though the construction is over land not included in the right of way portrayed in the filed profile.

The next issue is whether the claim of the Railroads is defeated by the Utah patent through which Cascade

claims. The Utah title is derived from the Fundamental Enabling Act of July 16, 1894, 28 Stat. 107, which granted Section 16 in each township to Utah for support of the public schools. The difficulty is that the Enabling Act provides, § 13, 28 Stat. 110, that the lands granted to the State "shall be selected under the direction of the Secretary of the Interior from the unappropriated public lands of the United States within the limits of said State of Utah." The disputed land was appropriated by the Railroads under the 1875 General Right of Way Act.

Wyoming v. Udall, 10 Cir., 379 F.2d 635, 640, cert. denied 389 U.S. 985, in discussing the Wyoming Enabling Act, said:

> "* * * the congressional intent was that if part of any section to be granted for school purposes had been disposed of under an act of Congress, the state on admission did not get that part of the section."

Boise Cascade seeks to limit the precedential value of the Wyoming case on the ground that it applied only to pre-1871 grants. That distinction applies to another aspect of the decision and does not affect its discussion of grants of school sections.

Boise Cascade next claims by reason of adverse possession, abandonment, estoppel, and boundary by acquiescence. It emphasizes that the Railroads have not fenced the entire 100 feet claimed on each side of the center line and have been aware of the occupation by

Boise Cascade. A factual dispute concerns the payment of taxes. These claims are all irrelevant. In Northern Pacific Ry. Co. v. Townsend, 190 U.S. 267, 271-272, the Court noted that in granting the right of way Congress conclusively determined the strip covered was necessary for an important public work and said:

> "The whole of the granted right of way must be presumed to be necessary for the purposes of the railroad, as against a claim by an individual of an exclusive right of possession for private purposes."

See also Northern Pacific Railroad Co. v. Smith, 171 U.S. 260, 275, and Himonas v. Denver & R.G.W.R. Co., 10 Cir., 179 F.2d 171, 173. The question of abandonment of the land covered by the profile map, see 43 U. . C. § 937, is of no concern as Boise Cascade claims no right to that land.

Boise Cascade also asserts rights under various state statutes. It claims to be a bona fide purchaser under § 57-3-2, Utah Code Anno., to be protected by the Occupying Claimants Act, § 57-6-1 et seq., and to have superior title under the Marketable Record Title Act, § 57-9-1 et seq. Section 57-9-6 of the latter Act says that it does not apply to extinguish a railroad easement. It is enough to say that state law cannot operate to "impair the efficacy" of a federal grant or vest title in someone other than the federal grantee. See Packer v. Bird, 137 U.S. 661, 669; Shively v. Bowlby, 152 U.S. 1, 44; and Northern Pacific Ry. Co. v. Townsend, 190 U.S. 267, 270.

The United States, which was joined as a party because of a possible reversionary interest, moved to dismiss on jurisdictional grounds. Because of its grant of summary judgment for the defendants, the district court did not consider the jurisdictional issue. In this court the United States asks that the district court judgment be affirmed but claims that the action against the United States is barred by the Quiet Title Act, 28 U.S.C. § 2409a. See Amoco Production Co. v. United States, 10 Cir., ...F.2d..... (No. 78-1147, decided April 21, 1980). In the circumstances presented, resolution of the point is unnecessary.

Affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

C 76-374

Filed March 24, 1978

BOISE CASCADE CORPORATION, a corporation,

Plaintiff,

v.

UNION PACIFIC RAILROAD COMPANY, a corporation; THE SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a corporation; and UNITED STATES OF AMERICA,

Defendants.

This matter is presently before the court on the motions for summary judgment of the plaintiff and of the defendant raiload companies, and the motion to dismiss of the defendant United States. Inasmuch as the motion to dismiss of defendant United States is based in part upon Rule 12(b)(6), *Federal Rules of Civil Procedure,* and matters outside of the pleadings have been presented to and not excluded by the court, the motion to dismiss shall be treated as one for summary judgment pursuant to Rule 12(b), *Federal Rules of Civil Procedure,* and disposed of in accordance with

Rule 56, *Federal Rules of Civil Procedure*. The matters presented by the motions have been thoroughly briefed by the parties, the matters were argued orally before the court on December 27, 1977, and the parties filed a stipulation of facts on January 3, 1978. Having fully and carefully considered the matters presented by the motions and concluding that there is no genuine issue as to any material fact, the court is prepared to enter its ruling.

Essentially, the present controversy is a property dispute concerning a certain strip of property located in Utah County. According to the stipulation of facts, "[t]he defendant railroads claim title to an easement for railroad purposes across the property extending 100 feet on each side of the center line of its trackage, based upon the General Right-of-Way Act of Congress March 3, 1875." Stipulation of Facts ¶ 4 (hereinafter "Stipulation"). The property in dispute is one side of the trackage only, that side being the west side. Rather than fencing the property to include the entire claimed 100 feet on each side of the trackage, the defendant railroads have, "for more than 20 years," fenced in only 33 feet on each side of the trackage. The remaining 67 feet of the 100 feet on one side of the trackage claimed by defendants is also claimed (and fenced) by plaintiff and, thus, it is this property area that is in dispute in this litigation. Stipulation ¶ 7.

As fully set forth in the stipulation of facts, plaintiff has a record chain of title to the real property in question based upon a patent issued by the State of

Utah to plaintiff's predecessor in interest. Stipulation ¶ 1. "The State of Utah's rights, if any, in and to the subject property, are based upon the Enabling Act which granted Utah Statehood and purported to convey to the State of Utah as a 'school section' all of Section 16 of Township 6 South, Range 2 East. The Enabling Act does not make any specific exception for the railroad right-of-way claimed by the defendant railroads, but does state that all lands granted the State under the Act are to be selected from the *unappropriated* public lands of the United States." Stipulation ¶ 3 (emphasis added).

The respective positions of the parties may be briefly stated as follows. It is the contention of defendants that defendant railroads, or their predecessor in interest, complied fully with the General Right-of-Way Act of 1875 and thus obtained from Congress the 200 foot right-of-way across the west half of Section 16, which includes within its westerly boundary the property in question. Under the law, defendants argue, this right-of-way obtained from Congress is not subject to defeasance by any theory of state law or any type of equitable consideration. Defendant Railroads' *Reply Memorandum* at 10. Plaintiff, on the other hand, claims that defendant railroads, or their predecessor in interest, did not comply fully with the General Right-of-Way Act of 1875 in that said parties filed an erroneous profile map with the Secretary of Interior and that, as a result thereof, defendant railroads have only "a possessory adverse right to the area" presently occupied by them. *Memorandum in Support of Plaintiff's Motion for Sum-*

mary Judgment and Opposition to Defendants' Motions at 4. Plaintiff further claims that it is the fee title owner of the property in dispute by virtue of one or more of the following statutes and doctrines: that it is a bona fide purchaser for value of the realty; that plaintiff has adversely possessed the property for the required time; that defendants have abandoned the right-of-way; that plaintiff has obtained the property by the doctrine of boundary by acquiescence; that plaintiff has a sure root of title from the State of Utah as described earlier; that the Utah Marketable Title Act (*Utah Code Ann.* §§ 57-9-1 to 9) constitutes a bar to defendants' claim to the property; and that plaintiff is a bona fide occupying claimant entitled to the benefits of *Utah Code Ann.* §§ 57-6-1 et seq. *Memorandum in Support of Plaintiff's Motion for Summary Judgment and Opposition to Defendants' Motions* at 1-2.

It is the opinion of the court that the defendant railroads, or their predecessor in interest, complied fully with the General Right-of-Way Act of 1875 and thereby acquired an easement for railroad purposes that was not affected by the patent granted by the State of Utah to plaintiff's predecessor in interest, and that has not been and cannot be subject to defeasance by the common law and state property doctrines and provisions relied upon by the plaintiff. On the basis of 43 U.S.C. § 934 and *Jamestown & N.R. Co. v. Jones,* 177 U.S. 125 (1900), the court concludes that defendant railroads have a right-of-way that was perfected in the following manner: first, the filing of defendant railroads' predecessor in interest, Utah Southern Railroad Company,

with the Department of Interior its articles of incorporation and due proofs of organization by no later than September, 1875 (Stipulation § 6); and, second, the construction of the railroads' trackage in 1873 (Stipulation ¶ 5). The above filings together with the previous actual construction of the trackage was all that was necessary to comply fully with the 1875 Act. As defendants correctly contend, the filing of the profile map pursuant to 42 U.S.C. § 937 and upon which plaintiff hinges its non-compliance argument is required and relevant only in connection with those situations in which the trackage is not already actually constructed at the time of the other required filings. *Jamestown, supra,* at 130-31.

Since the grant of the right-of-way under § 934 was secured by the actual construction of the trackage and the filing of the articles of incorporation and due proofs of organization, the only remaining question is whether the claim of the railroads based upon the Congressional grant to the railroads is inferior to the claim of plaintiff by virtue of the doctrines cited by plaintiff. First, the court concludes that the right-of-way granted by Congress cannot be diminished by conveyance, or by the doctrines of adverse possession, abandonment or boundary by acquiescence. *See, e.g., Northern Pac. Ry. v. Townsend,* 190 U.S. 267 (1903); *Himonas v. Denver & R.G.W.R. Co.,* 179 F.2d 171 (10th Cir. 1949); *Allard Cattle Co. v. Colorado & So. Ry. Co.,* 516 P.2d 123 (Colo. 1973), *aff'd.* 530 P.2d 503 (Colo. 1974). The reasoning of these cases is that the Congressional intent as to this result is plainly manifest and

that, under the grant, railroads are legally incapable of alienating the subject property in any way, directly or indirectly. The court concurs in this rationale.

Second, as defendant railroads set forth at pages 10 to 15 of their *Memorandum in Support of Motion for Summary Judgment*, plaintiff has not acquired and cannot acquire any rights to the property in question under its claimed patent pursuant to the Fundamental Enabling Act of July 16, 1894. This Act expressly provides that all lands granted the State under the Act are to be selected from the *unappropriated* public lands of the United States. Stipulation ¶ 3. And, as indicated above, the land in question was appropriated to the railroads pursuant to the General Right-of-Way Act of 1875.

Third, plaintiff's claimed reliance upon the Utah Marketable Title Act is misplaced. Dispositive of the present contention of plaintiff is § 57-9-6, *Utah Code Ann.*, which specifically excepts application of the Act by stating in pertinent part:

> This act shall not be applied . . . to bar or extinguish any easement or interest in the nature of an easement created or held for any . . . railroad or public utility purpose, or any easement or interest in the nature of an easement, the existence of which is clearly observable by physical evidence of its use. . . .

Finally, the aid sought by plaintiff in Utah's Occupying Claimants Act is of no avail in the present action. Even assuming the applicability of the statute,

that this statute has no bearing upon this action is apparent in view of the doctrine enunciated in several opinions of the United Staes Supreme Court that:

> The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the states for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the state, *subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee.*

Packer v. Bird, 137 U.S. 661, 669 (1891) (emphasis added). Also, see *Northern Pac. Ry. v. Townsend, supra,* at 270, and *Shively v. Bowlby,* 152 U.S. 1,44 (1894).

For the reasons stated, the court concludes that the claim of defendant railroads is superior to that of plaintiff. Wherefore,

IT IS HEREBY ORDERED that the motion for summary judgment of plaintiff is denied and the motions for summary judgment of defendants are granted.

The court has not considered the additional grounds urged by defendant United States in support of their motion to dismiss based upon the provisions of 28 U.S.C. §§ 2409a(f) and (g). See *Memorandum Brief in Support of Motion to Dismiss,* filed October 17, 1977, at 3-5.

DATED this 22nd day of March 1978.

ALDON J. ANDERSON
United States District Judge

APPENDIX C

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

SUMMARY JUDGMENT AND
DECREE QUIETING TITLE

Civil No. C 76-374

Filed May 2, 1978

BOISE CASCADE CORPORATION, a corporation,

Plaintiff,

v.

UNION PACIFIC RAILROAD COMPANY, a corporation; THE SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a corporation; and UNITED STATES OF AMERICA,

Defendants.

Plaintiff in the above-entitled action made a motion for summary judgment and defendants made a cross-motion for a summary judgment dismissing plaintiff's complaint and granting the prayer of defendant railroads' counterclaim and said motion and cross-motion duly came on to be heard by the Court on Decem-

ber 27, 1977. On considering all the proceedings had herein, and the pleadings and other documents on file herein, including the complaint, answers and counterclaim, memorandums of law with accompanying affidavits and exhibits, and stipulation of facts; and Brent D. Ward, Esq., having appeared for the defendant United States of America, and J. Clare Williams, Esq., having appeared for the defendant railroads, and Harry D. Pugsley, Esq., having appeared for the plaintiff, and the Court being fully advised in the premises, and due deliberation having been had thereon, and the Court having issued and filed its opinion, decision and order containing its findings of fact and conclusions of law:

NOW, IT IS HEREBY ORDERED, ADJUDGED and DECREED:

1. That plaintiff's motion for summary judgment be, and it hereby is denied.

2. That plaintiff's complaint hereby be, and it hereby is, dismissed on the merits.

3. That defendants' cross-motion for summary judgment be, and the same is granted.

4. That the prayer of defendant railroads' counterclaim be, and it hereby is granted and in regard thereto, it is hereby further ORDERED, ADJUDGED and DECREED that:

(1) The plaintiff has no estate or interest whatsoever in or to that certain 200 foot right of way easement

for railroad purposes, to the extent of 100 feet on each side of defendants' tracks, granted the Utah Southern Railroad Company pursuant to the General Right of Way Act of Congress of March 3, 1875 (18 Stat. 482, 43 U.S.C.A. § 934), as said right of way easement traverses the W. ½ of Section 16, T. 6 S., R. 2 E., SLB&M, or in the real property hereinafter described lying within the boundaries of said right of way which estate or interest is or may be inconsistent with the estate and interest held by defendant railroad companies pursuant to said Right of Way Act of March 3, 1875.

(2) The San Pedro, Los Angeles and Salt Lake Railroad Company and Union Pacific Railroad Company, subject to any interest retained by the United States, are owner and lessee, respectively, of a 200 foot wide right of way easement for railroad purposes, to the extent of 100 feet on each side of their tracks, obtained by Congressional grant pursuant to the General Right of Way Act of March 3, 1875 (18 Stat. 482, 43 U.S.C.A. § 934), are entitled to exclusive and perpetual use and enjoyment of the real property, hereinafter described, for as long as it is used for railroad-connected purposes, are in possession thereof, and are entitled to such possession thereof, and that such title of said railroad companies in and to said right of way property be and the same hereby is quieted against all claims and demands of plaintiff and that said plaintiff is hereby forever barred from asserting any claim whatsoever in and to said right of way property or any part thereof adverse to the estate and interest of defendant railroad companies.

The property in question is situated in Utah County, State of Utah, being that portion of the W. ½ of Section 16, T. 6 S., R. 2 E., SLB&M, more particularly described as follows:

> Commencing at a point 326 feet East and 49 feet South of the Northwest corner of the Southwest quarter of Section 16, Township 6 South, Range 2 East, Salt Lake Base and Meridian; said point being in the Southerly boundary line of Orem City Center Street; thence South 101 feet; thence West 96 feet; thence South 50 feet; thence West 200 feet to the Easterly boundary line of Utah State Highway 114 right-of-way; thence along said highway right-of-way boundary line South 0°06′ East 925.58 feet; thence East 531.30 feet, more or less, to the Westerly boundary line of the Los Angeles and Salt Lake Railroad right-of-way; thence along said railroad right-of-way line North 7°15′ West 1082.53 feet, more or less, to the Southerly boundary line of Orem City Center Street right-of-way; thence along said street right-of-way boundary line West 106.89 feet to the point of beginning.

DATED this 2nd day of May, 1978.

BY THE COURT:

ALDON J. ANDERSON,
Chief Judge
United States District Court

APPENDIX D

SEPTEMBER TERM — September 22, 1980

Before Honorable William J. Holloway, Jr., Honorable Jean S. Breitenstein and Honorable William E. Doyle, Circuit Judges.

No. 78-1462

BOISE CASCADE CORPORATION, a corporation,

Plaintiff-Appellant

vs.

UNION PACIFIC RAILROAD COMPANY, a corporation; THE SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a corporation; and UNITED STATES OF AMERICA,

Defendants-Appellees.

This matter comes on for consideration of appellant's petition for rehearing filed in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied.

HOWARD K. PHILLIPS

Clerk

APPENDIX E

SEPTEMBER TERM — September 23, 1980
Before Honorable Oliver Seth, Chief Judge, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable Williams E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Circuit Judges

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No. 78-1462

BOISE CASCADE CORPORATION, a corporation,

Plaintiff-Appellant,

vs.

UNION PACIFIC RAILROAD COMPANY, a corporation; THE SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a corporation; and UNITED STATES OF AMERICA,

Defendants-Appellees.

This matter comes on for consideration of appellant's suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS,
Clerk

APPENDIX F

§ 934. *Right-of-way through public lands granted to railroads*

The right of way through the public lands of the United States is granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turnouts, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road. Mar. 3, 1875, c. 152, § 1, 18 Stat. 482.

§ 935. Several roads through canyons

Any railroad company whose right of way, or whose track or roadbed upon such right of way, passes through any canyon, pass, or defile, shall not prevent any other railroad company from the use and occupancy of the said canyon, pass, or defile, for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade. And the location of such right of way through any canyon, pass, or defile shall not cause the disuse of any wagon or other public highway located therein on March 3, 1875, nor prevent the

location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any canyon, pass, or defile, said railroad company shall before entering upon the ground occupied by such wagon road, cause the same to be reconstructed at its own expense in the most favorable location, and in as perfect a manner as the original road: *Provided,* That such expenses shall be equitably divided between any number of railroad companies occupying and using the same canyon, pass or defile. Mar. 3, 1875, c. 152, § 2, 18 Stat. 482.

§ 936. *Condemnation of private land*

The legislature of the proper Territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned; and where such provision shall not have been made, such condemnation may be made in accordance with section 3 of the act entitled "An Act to amend an Act entitled 'An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes, approved July 1, 1862,'" approved July 2, 1864. Mar. 3, 1875, c. 152, § 3, 18 Stat. 482.

§ 937. *Filing profile of road; forfeiture of rights*

Any railroad company desiring to secure the benefits of sections 934-939 of this title shall, within twelve

months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the officer, as the Secretary of the Interior may designate, of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided*, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road. Mar. 3, 1875, c. 152, § 4, 18 Stat. 483; 1946 Reorg. Plan No. 3, § 403, eff. July 16, 1946, 11 F.R. 7876, 60 Stat. 1100.

§ 938. *Lands excepted*

Sections 934-939 of this title shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands especially reserved from sale, unless such right of way shall be provided for by treaty-stipulation or by Act of Congress passed prior to March 3, 1875. Mar. 3, 1875, c. 152, § 5, 18 Stat. 483.

§ 939. Alteration, amendment, or repeal

Congress hereby reserves the right at any time to alter, amend, or repeal sections 934-939 of this title, or any part thereof. Mar. 3, 1875, c. 152, § 6, 18 Stat. 483.

§ 940. *Forfeiture of rights where railroad not constructed in five years after location*

Each and every grant of right of way and station grounds made prior to February 25, 1909, to any railroad corporation under sections 934-939 of this title where such railroad had not been constructed and the period of five years next following the location of said road, or any section thereof, had on that date expired, is declared forfeited to the United States, to the extent of any portion of such located line then remaining unconstructed, and the United States resumes the full title to the lands covered thereby free and discharged from such easement, and the forfeiture declared shall, without need of further assurance or conveyance, inure to the benefit of any owner or owners of land conveyed by the United States prior to such date subject to any such grant of right of way or station grounds: *Provided,* That no right of way on which construction was progressing in good faith on February 25, 1909, shall be in any wise affected, validated, or invalidated, by the provisions of this section. Feb. 25, 1909, c. 191, 35 Stat. 647.

28 Statutes at Large 107, Fifty-Third Congress, 1894.

CHAP. 138—An Act To enable the people of Utah to form a constitution and State government, and to be admitted into the Union on an equal footing with the original States. July 16, 1894.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the inhabitants of all that part of the

area of the United States now constituting the Territory of Utah, as at present described, may become the State of Utah, as hereinafter provided.

. . . .

SEC. 6. That upon the admission of said State into the Union, sections numbered two, sixteen, thirty-two, and thirty-six in every township of said proposed State, and where such sections or any parts thereof have been sold or otherwise disposed of by or under the authority of any Act of Congress other lands equivalent thereto, in legal subdivisions of not less than one quarter section and as continguous as may be to the section in lieu of which the same is taken, are hereby granted to said State for the support of common schools, such in demnity lands to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of the Interior: *Provided*, That the second, sixteenth, thirty-second, and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this Act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this Act until the reservation shall have been extinguished and such lands be restored to and become a part of the public domain.

. . . .

SEC. 13. That all land granted in quantity or as indemnity by this Act shall be selected under the direction of the Secretary of the Interior, from the unappropriated public lands of the United States within the limits of said State of Utah.

. . . .

APPENDIX G

Territory of Utah }
Salt Lake County } ss

I, William Clayton, Auditor of Public Accounts of Utah Territory, do hereby certify and state, that the organization of the "Utah Southern Railroad Company", a corporation created under and by virtue of the laws of the said Territory, has been completed; that the said Railroad Company is fully authorized to proceed with the construction of its road according to the existing laws of the said Territory; and that the copy of the Articles of Association to which this statement is attached, is a full, true, and correct copy of the original "Articles of Association" of the said Company, now on file in my office, where the same are by law required to be kept.

Witness my hand and official seal, at my office in Salt Lake City, Utah Territory, this seventeenth day of August A.D. 1875.

/s/ Wm Clayton
Auditor of Public Accounts
for Utah Territory

SEAL

80-1016

No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1980

BOISE CASCADE CORPORATION,

Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY; SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY and UNITED STATES OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

J. CLARE WILLIAMS,
Counsel of Record

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Attorney for Respondent Railroads

QUESTIONS PRESENTED

1. Can the General Right of Way Act of March 3, 1875, 18 Stat. 482, 43 U.S.C. §§ 934-939, be applied to grant a railroad company a right of way for trackage which was constructed prior to its enactment?

2. Can the Secretary of the Interior's decision in 1875 which approved the filings of a railroad company under the Act, authorizing the railroad to obtain a right of way for its trackage, be collaterally attacked in this case 106 years later?

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, Union Pacific Railroad Company and San Pedro, Los Angeles & Salt Lake Railroad Company (hereinafter referred to as "Railroad"), respectfully prays that Petitioner's application for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on July 24, 1980, be denied.

STATUTORY PROVISIONS INVOLVED

Decisions interpreting application of the General Right of Way Act of March 3, 1875, 18 Stat. 482, 43 U.S.C. §§ 934-939 (hereinafter "Act"), generally cite it as contained in the Statutes at Large of the United States. Accordingly, for the ease and convenience of the Court, the Act is thus set forth herein as Appendix A.

STATEMENT OF THE CASE

The Railroad adds the following facts and information to Boise Cascade's Statement, in order to provide a more complete and accurate statement of the case:

1. The Railroad's claim of title to a 100 foot right of way on each side of the center line of its track is based upon (a) filing in 1875 with the Secretary of Interior (Secretary) its articles of incorporation and due proofs of its organization; and (b) actual construction of the railroad line over the property in question as of the date the filing was made. The Railroad does not rely on the profile map to establish its rights in the property.

2. The State of Utah patented the property on July 15, 1905, to Boise Cascade's predecessor in interest, "the legal heirs of Hans C. Anderson." The property was conveyed "subject to any easement or right of way of the public to use all such highways as may have been established according to law, over the same or any part thereof" (R. 255).

3. Boise Cascade has made valuable improvements on the land; however, nearly all the improvements were made after the Railroad notified Boise Cascade of its claim of ownership to the property in writing on February 14, 1975. Prior to that time, Boise Cascade had only leveled the ground and installed a drainage ditch. Subsequent to and in spite of receiving the written notice, Boise Cascade proceeded to install more valuable improvements including fencing, office and storage sheds and buildings (R. 258).

4. The Railroad has refused to admit that Boise Cascade's "certified plat" (R. 115) is accurate because it is unable to determine whether the line of railroad as shown on the profile map is more than 100 feet east of where the tracks were actually built. It is impossible to use the map to accurately scale distances from one point to another. The Railroad believes that the map cannot be properly used for such purposes because of its difficult scale (approximately 1½" to the mile)[1], and because the sections are platted as uniform squares which, in reality, is seldom the case.

5. On December 3-4, 1874, the Surveyor General's office in Salt Lake City officially surveyed and platted the area where the subject property is located. The survey notes and the map, dated March 12, 1875 (R. 186), clearly showed the location and existence as

---

[1] Regulations issued by the Secretary subsequent to passage of the Act required the profile map to have a scale of no less than 1 inch to 2,000 square feet. Regulations of February 1, 1904, 32 Land Decisions 481, 486 (1904); Circular of January 13, 1888, 12 Land Decisions 423, 428 (1891).

of December 1874 of the Railroad's already constructed line of railroad as it traversed the west one-half of Section 16, Township 2 South, Range 2 East, Salt Lake Base and Meridian where the property is located. A Railroad track engineer who is a licensed surveyor has testified (R. 182) that he located the notes and map in the Bureau of Land Management office in Salt Lake City, and that the line of railroad as depicted in both the survey notes and on the map is within 10-14 feet of where the tracks are now located.

REASON WHY THE WRIT SHOULD NOT BE GRANTED

The decision of the Court of Appeals does not warrant review by this Court for the following reasons:

1. THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR GRANTING REVIEW.

A. *There is no conflict with prior decisions of this Court or between circuit courts or with a state court of last resort concerning any issue in this case.*

The courts below have followed clear lines of well reasoned and long established authority in reaching the decisions from which Boise Cascade has appealed. *Jamestown & Northern R.R. v. Jones,* 177 U.S. 125 (1900), and a number of cases following that de-

cision[2] have clearly established the principle that under the Act filing a profile map is unnecessary where a line has already been constructed.

In *Rio Grande Western Ry. v. Stringham,* 38 Utah 113, 110 P. 868 (1910), *aff'd* 239 U.S. 44 (1915), *rev'd* on another ground in *Great Northern Ry. v. United States,* 315 U.S. 262, 279 (1941), the Utah Supreme Court directly held in a well reasoned decision that the Act should be applied retroactively to an earlier built line of railroad.

Rio Grande Western Ry., supra, is based on the rule established in landmark cases[3] that the quasi-judicial decisions of the Secretary of the Interior granting railroads rights of way under the Act are conclusive and not reviewable in collateral proceedings. *Jamestown & Northern Ry., supra,* 177 U.S. at 131, 132, also supports a retroactive interpretation of the Act. Boise Cascade has cited no statutory or case authority contrary to these decisions.

B. *There are no important questions of federal law involved in this case which need to be settled by this Court.*

This case involves a quiet title action concerning approximately 10 acres of ground. Boise Cascade alleges

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[2] **Stalker v. Oregon Short Line R.R., 225 U.S. 142 (1912); Washington & Idaho R.R. v. Coeur D'Alene Ry. & N. Co., 160 U.S. 77 (1895); Minnesota, S.P. & S.Ste. M. Ry. v. Doughty, 208 U.S. 51 (1908); Stuart v. Union Pac. R.R., 227 U.S. 342 (1913); United States v. Southern Pac. Transp. Co., 543 F.2d 676 (9th Cir. 1976).**

[3] **Noble v. Union River Logging R.R., 147 U.S. 165 (1893); French v. Fyan, 93 U.S. 169 (1876).**

that the value of the realty is $60,000 and the value of the improvements thereon is $200,000 (R. 3). Boise Cascade admits, however, that most of these improvements, including the more valuable ones, were voluntarily made after and in spite of written notice of the Railroad's claim to the property (R. 258).

It is unreasonable for Boise Cascade to claim harm as a result of being misled by an alleged erroneous profile map filed in Washington D.C. in August 1875, when the local United States land office records have reflected the Railroad's actual location over the property since March 1875 (R. 182, 186).

The issues of this case have been previously decided by this Court, except the question of the retroactivity of the Act. The retroactivity issue was correctly decided by the Utah Supreme Court in *Rio Grande Western Ry., supra.* That decision was based upon this Court's holding in *Noble v. Union River Logging R.R., supra,* and is supported by a plain reading of § 1 of the Act and the language of *Jamestown & Northern Ry., supra,* 177 U.S. 131, 132.

The fact that *Rio Grande Western Ry., supra,* is the only decision since passage of the Act (106 years ago) which addresses the retroactivity issue indicates that this question is not of great or widespread public interest or import. Moreover, since the Act was repealed in 1976[4], it is unlikely that the issue involved

[4] Pub. L. 94-579, Title VII, § 706(a), 90 Stat. 2793.

herein will become an "important question of federal law" at any time in the future.

There is no evidence before this Court that the decision below has "clouded the title to land of thousands of private individuals." Neither the Railroad nor Boise Cascade has any idea how many railroad lines constructed prior to 1875 were built without government aid. Boise Cascade's bare allegation that "many hundreds of miles of other railroads" falls into this category is at best speculative and presumptive.

2. THE DECISION BELOW FOLLOWS THE INTENT AND THIS COURT'S INTERPRETATION OF THE ACT.

A. *The Act is to be liberally construed.*

This Court has made it clear that grants under the Act stand on different footing than merely private grants, and should receive from those interpreting and administering it a more liberal interpretation in favor of the purposes for which the Act was passed. *Great Northern Ry. v. United States, supra,* 315 U.S. at 272; *United States v. Denver & R.G.W. R.R.*, 150 U.S. 1, 8 (1893); *Great Northern Ry. v. Steinke*, 216 U.S. 119, 124 (1922). *McDonald v. United States*, 119 F.2d 821 (9th Cir. 1941), clearly states, "The grantee is entitled to have the act liberally construed to effect the purpose for which it was enacted." 119 F.2d at 825 (citation omitted).

The purpose of the Act was to promote the construction and operation of railroads in order to build

the West. As stated in *Great Northern Ry. v. Steinke, supra*:

> Its purpose was to enhance the value and hasten the settlement of the public lands by inviting and encouraging the construction and operation of needed and convenient lines of railroad through them.

261 U.S. at 124.

The Railroad's tracks between Salt Lake City and Juab, Utah were constructed and placed in operation in five different segments—four short segments prior to March 1875, and one long segment after this date. The section to Sandy was finished in September 1871; the section to Lehi Junction was completed in September 1872; the section to Provo in November 1873; the section to York in February 1875; and the section to Juab in June 1879 (R. 238). Treating the entire distance of 102 miles from Salt Lake City to Juab as a single line of railroad, as it eventually became, it is entirely consistent with the intended purposes of Congress to have the Act apply to the entirety of the track rather than just the last portion constructed from York to Juab subsequent to 1875.

As the cases explain, the Act is to be liberally construed to encourage and assist in both the "construction and operation" of railroads in the west. Although construction of the segment in question was completed prior to 1875, operations thereover had just recently begun and substantially more trackage was yet to be built and operated (R. 238) at the time the benefits of the

Act were applied for by the Utah Southern in September 1875. If obtaining the benefits of the Act allowed the Utah Southern to use additional resources to facilitate its operation over the earlier constructed segments of its track and then to continue building and extend such operation a number of miles further south to Juab subsequent to passage of the Act, it would seem that the Secretary properly construed the Act by allowing it to apply to those connected segments which were constructed prior to the Act's passage as well as to those segments constructed after the Act's passage.

No authority cited by Boise Cascade states that the Act was intended to be restrictively and strictly applied only prospectively to "new rail lines" or "new construction." Such an interpretation is not found in the legislative history nor in any of the many cases which have construed and applied the Act. It is found only in Boise Cascade's argument.

B. *Applying the Act retroactively promotes the purposes and intent of the Act.*

Early cases interpreting the Act recognized that the Act was loosely drafted and contained some uncertainty. *Great Northern Ry. v. Steinke*, 261 U.S. 119, 124; *Jamestown & Northern R.R. v. Jones*, 177 U.S. 125, 130. But as stated in *Great Northern Ry.*, 261 U.S. 119, 124, "through a long course of administration in the Land Department and many adjudications in the courts its meaning and effect have come to be pretty well settled."

Section 1 of the Act states, in part:

> That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road.

General Right of Way of March 3, 1875, 18 Stat. 482, 43 U.S.C. § 934. A landmark decision interpreting the meaning and effect of the Act is *Jamestown & Northern R.R., supra,* where the court held that (1) the applicant railroad became a grantee under the Act simply by filing its articles of incorporation and proofs of organization; (2) the granted right of way could be identified and located by actually constructing the line of railroad or, in advance of such construction, by filing a profile map of the line; and (3) no map need be filed at all if construction had already taken place. The case also indicates that by the very language of § 1 of the Act Congress intended it to apply to an already "constructed" railroad line. In so construing the Act, the court said:

> Secretary Vilas said in *Dakota Central R.R. v. Downey*: "As to the roadway, the construction of road fixes the boundaries of the grant, and fixes it by the exact rule of the statute. . . .
>
> "It seems to me that the fourth section of the act was written for another purpose and for another case. It relates to a case of a railroad com-

> pany which desires to secure the present grant, and give to it fixity of location, *before* its road shall be constructed; and it is designed to provide a similar privilege in respect to rights of way which acts granting lands to aid in the construction of railroads have provided—namely, the privilege of giving fixity of location to the subject of the grant *before* construction of the road.
>
> * * *
>
> "It does not become necessary for a road which has secured the benefits of this act, by taking the steps which give it the attitude of being named in the first section as grantee, and by building a road through the public lands, whereby the subject of the grant has been defined, to file a map of definite location in order to entitle it to the benefits of the right of way.
>
> "The fourth section is designed to provide a mode by which fixity of location can be secured to a grantee, *in anticipation* of that construction by which location is defined in the section making the grant, and which shall have the effect, before the construction of the road, which the terms of the grant limit to the 'central line of said road,' which only means—without the fourth section—a *constructed* road."

177 U.S. at 132. Thus, the Act by its very language appears intended to refer to a road which, as of the date of passage of the Act, was already built and in existence.

3. THE SECRETARY'S DECISION APPROVING THE GRANT IS CONCLUSIVE.

In *French v. Fyan, supra,* it was held that the action of the Secretary identifying swamp lands, mak-

ing lists thereof and issuing patents therefor, could not be impeached in an action at law by showing that the lands which the patent conveyed were not, in fact, swamp lands, even though the Secretary's jurisdiction extended only to lands of that class. The court explained its holding by quoting from *Johnson v. Towsley*:

> "[T]he general doctrine, that when the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all others. That the action of the land-office in issuing a patent for any of the public lands, subject to sale by pre-emption or otherwise, is conclusive of the legal title, must be admitted under the principle above stated; and in all courts, and in all forms of judicial proceedings where this title must control, either by reason of the limited powers of the court or the essential character of the proceedings, no inquiry can be permitted into the circumstances under which it was obtained."
>
> . . . [W]e are of the opinion that, in this action at law, it would be a departure from sound principle, and contrary to well considered judgments in this court, and in others of high authority, to permit the validity of the patent to the State to be subjected to the test of the verdict of a jury on such oral testimony as might be brought before it. It would be substituting the jury, or the court sitting as a jury, for the tribunal which Congress had provided to determine the question, and would be making a patent of the United States a cheap and unstable reliance as a title for lands which it purported to convey.

93 U.S. at 172 (citation omitted)

To the same effect is *Noble v. Union River Logging R.R., supra,* where this Court said:

> In this class of cases, if the allegation be properly made, and the jurisdiction be found by the Court, such finding is conclusive and binding in every collateral proceeding. And even if the Court be imposed upon by false testimony, its finding can only be impeached in a proceeding instituted directly for that purpose.
>
> The lands over which the right of way was granted were public lands subject to the operation of the statute, and the question whether the plaintiff was entitled to the benefit of the grant was one which it was competent for the Secretary of the Interior to decide, and when decided, and his approval was noted upon the plat, the first section of the act vested the right of way in the railroad company. The language of that section is 'that the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory,' etc. The uniform rule of this court has been that such an act was a grant *in præsenti* of lands to be thereafter identified. . . . The railroad company became at once vested with the right of property in these lands, of which they can only be deprived by a proceeding taken directly for that purpose. If it were made to appear that the right of way had been obtained by fraud, a bill would doubtless lie by the United States for the cancellation and annulment of an approval thus obtained.

147 U.S. at 176.

It is clear that the Secretary had jurisdiction to consider the Utah Southern's application under the Act.

Accordingly, regardless of whether he correctly exercised such authority, his actions were valid under the law and are not assailable in this proceeding. *Accord, Jackman v. Atchison, T. & S.F. R.R.*, 170 P. 1036, 1042 (N.M. 1918).

It is equally clear from the documents obtained from the General Services Administration, National Archives and Records Service (R. 187), that the Secretary recognized the filings of the Utah Southern as being appropriately submitted pursuant to the Act; he approved and accepted them as being in substantial conformity with the requirements thereof; and by so doing he was clearly and consciously authorizing the Utah Southern to obtain the benefits of the Act for a line of railroad which had already been constructed. That the Secretary was aware that the line had already been constructed[5] is evident by the acknowledgement of the Utah Southern's Chief Engineer on the profile map which the Secretary approved (R. 39). The Engineer stated under oath on the profile map filed with the Secretary that he:

> [L]ocated a line of railroad . . . from Salt Lake City . . . to Payson City . . ., a distance of sixty-five and one half miles, and completed the same

[5] The August 1875 certification of the Territorial Auditor, William Clayton to Utah Southern's Articles of Incorporation filed with the Secretary (R. 217), advising "that the said Railroad Company is fully authorized to proceed with construction of its road," does not show otherwise since this statement can logically be construed to refer to the continued construction of the railroad from York to Juab, Utah which occurred between February 1875 and June 1879 (R. 238).

> the entire distance between the said places on the first day of December A.D. 1874. . . .

Contrary to Boise Cascade's characterization of the Secretary's decision in granting the benefits of the Act "clearly *ultra vires,*" his decision is conclusive as to this collateral proceeding.

CONCLUSION

In writing the opinion in the decision below, Judge Breitenstein said the Court was "convinced that the 1875 Act applies to determine the rights of the parties." 630 F.2d 720, 723. The Railroad submits that this decision by the Court below is correct, and that Boise Cascade's petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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Salt Lake City, Utah 84101

Attorney for Respondent Railroads

February 1981

APPENDIX A

18 Stat. 482. *An Act granting to railroads the right of way through the public lands of the United States.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorportion, and due proofs of its organizaton under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station-buildings, depots, machine-shops, side-tracks, turn-outs, and water-stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

§ 2.

That any railroad company whose right of way, or whose track or road bed upon such right of way, passes through any canyon, pass, or defile, shall not prevent any other railroad company from the use and occupancy of the said canyon, pass, or defile for the purposes of its road in common with the road first located, or the crossing of other railroads at grade. And the location of such right of way through any canyon, pass, or defile

shall not cause the disuse of any wagon or other public highway now located therein, nor prevent the location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any canyon, pass, or defile, said railroad company shall before entering upon the ground occupied by such wagon road, cause the same to be reconstructed at its own expense in the most favorable location and in as perfect a manner as the original road: Provided, That such expenses shall be equitably divided between any number of railroad companies occupying and using the same canyon, pass, or defile.

§ 3.

That the Legislature of the proper Territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned; and where such provision shall not have been made, such condemnation may be made in accordance with section three of the act entitled "An act [to amend an act entitled an act] to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes, approved July first, eighteen hundred and sixty-two, (") approved July second, eighteen hundred and sixty-four.["]

§ 4.

That any railroad company desiring to secure the benefits of this act, shall within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secreary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: Provided, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

§ 5.

That this act shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands specially reserved from sale, unless such right of way shall be provided for by treaty-stipulation or by act of Congress heretofore passed.

§ 6.

That Congress hereby reserves the right at any time to alter, amend, or repeal this act, or any part thereof. Approved March 3, 1875.

No. 80-1016

In the Supreme Court of the United States

OCTOBER TERM, 1980

BOISE CASCADE CORPORATION, PETITIONER

v.

UNION PACIFIC RAILROAD COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the railroad company complied with the filing requirements of the General Right-of-Way Act of 1875 with respect to the right-of-way at issue.

2. Whether the 1875 Act allowed a railway company to obtain a 200-foot wide right-of-way for a rail line constructed over the public lands prior to the enactment of the statute.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 630 F. 2d 720. The opinion of the district court (Pet. App. B) is reported at 454 F. Supp. 531.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 1980. An order denying a petition for rehearing was entered on September 22, 1980 (Pet. App. D), and an order denying a suggestion of rehearing en banc was entered on September 23, 1980 (Pet. App. E). The petition for a writ of certiorari was filed on December 19, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Sections 1 and 4 of the General Right-of-Way Act of 1875, ch. 152, 18 Stat. 482, 43 U.S.C. 934 and 937, repealed by the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, Section 706(a), 90 Stat. 2793, provided:

> Section 1. That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station-buildings, depots, machine shops, side-tracks, turn-outs, and water stations, not to exceed in amount twenty acres

for each station, to the extent of one station for each ten miles of its road.

* * * * *

Section 4. That any railroad-company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided,* That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

STATEMENT

1. In 1873, the Utah Southern Railroad Company constructed a rail line over the public lands of the United States, including lands in Section 16, T. 6S, R. 2E, Utah County, Utah. Subsequently, the San Pedro, Los Angeles & Salt Lake Railroad Company acquired Utah Southern's interests and leased the rail line, which remains in its original location, to the Union Pacific Railroad Company. The railroad companies maintain fences on each side of their line approximately 33 feet from the center line of the trackage (Pet. App. A-2, B-2).

In 1875, less than two years after the rail line at issue was constructed, Congress enacted the General Right-of-Way Act, ch. 152, 18 Stat. 482, 43 U.S.C. 934 *et seq.*, which has since been repealed by Section 706(a) of the Federal Land

Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2793. Section 1 of the 1875 Act, 43 U.S.C. 934, granted rights-of-way through the public lands of the United States to duly organized railway companies that filed copies of their articles of incorporation and due proofs of organization with the Secretary of the Interior. Section 1 further provided that railway companies invoking the Act would be entitled to a right-of-way "to the extent of one hundred feet on each side of the central line of said road * * *." In Section 4, 43 U.S.C. 937, the 1875 Act provided that a railway company seeking to obtain a right-of-way under the Act shall, in the case of surveyed lands, "within twelve months after the location of any section of twenty miles of its road * * * file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way * * *." Finally, Section 4 also provided for forfeiture of the right-of-way if the rail line was not constructed within five years after location.

Pursuant to the 1875 Act, Utah Southern filed its articles of incorporation and due proofs of organization. At the same time, the railroad company filed a profile map. The filings were duly approved by the Secretary of the Interior in September 1875 (Pet. App. B-4 to B-5).

In 1894, Congress enacted the Utah Enabling Act, ch. 138, 28 Stat. 107. Subject to certain exceptions and limitations, Section 6 of that Act, 28 Stat. 109, granted the State, as school lands, all sections numbered 2, 16, 32 and 36. The State, in turn, patented lands within Section 16, T. 6S, R. 2E, to the predecessors in interest of petitioner Boise Cascade Corporation in 1905. Petitioner subsequently purchased the tract at issue, which is located west of, and adjacent to, the railroad companies' track (Complaint at 2).

2. In 1976, petitioner Boise Cascade Corporation, alleging jurisdiction under the Quiet Title Act, 28 U.S.C. 2409a, initiated this action against the railroad companies and the United States.[1] The dispute centered over title to a 67-foot wide strip of land parallel and adjacent to the fenced portion of the right-of-way. Petitioner claimed that the railway right-of-way extended only to the fence located 33 feet from the center of the trackage, not to a line 100 feet from the center. It contended that the railroad companies were not entitled to a right-of-way 100 feet on both sides of their trackage, as conferred by the 1875 Act, because, *inter alia,* the 1875 Act did not apply to lines constructed before its passage and because the profile map filed with the Secretary depicted the rail line as being located approximately 400 feet east of the line actually constructed in 1873.[2] The railroad companies, in response, contended that they were, by virtue of their compliance with the 1875 Act, entitled to a right-of-way extending 100 feet on both sides of the center of their trackage (Pet. App. A-2 to A-3). The United States moved to dismiss, relying on 28 U.S.C. 2409a(f), which provides that Quiet Title Act suits must be brought within 12 years of the date the plaintiff or his predecessor knew or should have known of the claim of the United States.

3. The district court entered summary judgment in favor of the defendants (Pet. App. B), holding that the railroad companies had secured a 200-foot wide right-of-way under the 1875 Act. The court held that Utah Southern had fully complied with the requirements of the 1875 Act by constructing the line and by subsequently filing its articles

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[1]The United States has potential subsurface and reversionary interests in the right-of-way (Pet. App. A-2).

[2]The railroad companies disputed Boise Cascade's allegation that the profile map did not accurately depict the location of the line constructed in 1873. The courts below found it unnecessary to resolve this factual dispute (Pet. App. A-3).

of incorporation and due proofs of incorporation with the Department of the Interior (Pet. App. B-4 to B-5).

The court of appeals affirmed (Pet. App. A). The court held that a railroad that constructed a line prior to enactment of the 1875 Act could avail itself of the provisions of the Act and that any errors in the filed profile map were immaterial because the actual location of the line on the ground controlled over the profile map (*id.* at A-4 to A-5). In view of this disposition, the court of appeals, like the district court, found it unnecessary to reach the government's contention that the claim against the United States was barred by the 12-year limitations clause of the Quiet Title Act (*id.* at A-8).

ARGUMENT

The decision of the court of appeals is correct, does not conflict with the decisions of this Court or the other courts of appeals, and presents no issues warranting review by this Court. Accordingly, the petition should be denied.

1. In *Jamestown & Northern R.R.* v. *Jones*, 177 U.S. 125 (1900), this Court, in construing the 1875 Act, held that a railroad company becomes a grantee under the Act by filing its articles of incorporation and due proofs of organization with the Secretary of the Interior. *Id.* at 130. The Court further held that the location of the right-of-way becomes fixed by compliance with the provisions of Section 4 relating to the filing of the profile map or, alternatively, by the actual construction of the road. 177 U.S. at 130-131. In so holding, the Court expressly adopted the construction of the 1875 Act set forth by the Secretary of the Interior in *Dakota Central R.R.* v. *Downey*, 8 Pub. Lands Dec. 115 (1889), in which the Secretary stated that Section 4 of the Act, which provides for the filing of a profile map, merely offers the grantee an alternative mode by which, if it so elects, it may secure a fixed right-of-way "*in anticipation*

of that construction by which location is defined in the section making the grant * * *" (*Jamestown & Northern R.R., supra,* 177 U.S. at 131-132, quoting *Dakota Central R.R., supra,* 8 Pub. Lands Dec. at 119 (emphasis in original); see also *Barlow* v. *Northern Pacific Ry.*, 240 U.S. 484 (1916)).

It necessarily follows that if, as this Court held in *Jamestown,* the right-of-way became fixed on the ground upon construction of the road, then the location of that fixed right-of-way is not altered by the subsequent filing of an erroneous profile map. This is especially true where, as here, the plaintiff fails to allege that it relied on the supposedly inaccurate map. *Washington & Idaho R.R.* v. *Coeur d'Alene Ry. & Navigation Co.*, 52 F. 765, 767-768 (C.C.D. Idaho 1892). As this Court stated in *Jamestown* (177 U.S. at 131), "[a]ctual construction of the road is certainly unmistakable evidence and notice of appropriation." Petitioner's suggestion (Pet. 13) that the filing of the allegedly inaccurate profile map might have been taken as evidence that the same railroad company intended to construct a parallel line 400 feet to the east of its existing line in the sparsely settled Utah Territory is unrealistic.

2. Although petitioner concedes (Pet. 4-5) that the Secretary of the Interior accepted the railway's filings pursuant to the 1875 Act, it urges that the right-of-way benefits of the 1875 Act could not be extended to railway companies that constructed railroad lines over the public lands prior to the enactment of the statute. The contention that the 1875 Act does not apply to lines constructed before its enactment was rejected 70 years ago by the Supreme Court of Utah, the very state in which the instant controversy arises. See *Rio Grande Western Ry.* v. *Stringham,* 38 Utah 113, 119-120, 110 P. 868, 870-871 (1910), aff'd on other grounds, 239 U.S. 44 (1915). And with good reason. This Court has noted that

the actual development of the West often preceded congressional authorization of particular actions and that Congress frequently later legislated to legitimize customs and usages sanctioned in practice, if not yet by federal law. Thus, in *Central Pacific Ry.* v. *Alameda County,* 284 U.S. 463 (1932), in construing an act granting rights-of-way over the public lands for public highways in terms indistinguishable from the provision at issue here,[3] this Court stated (*id.* at 473): "Governmental concurrence in and assent to the establishment of these roads are so apparent, and their maintenance so clearly in furtherance of the general policies of the United States, that the moral obligation to protect them against the destruction or impairment as a result of subsequent grants follows as a rational consequence. The section of the Act of 1866 granting rights of way for the construction of highways, no less than that which grants the right of way for ditches and canals, was, so far as then existing roads are concerned, a voluntary recognition and confirmation of preexisting rights, brought into being with the acquiescence and encouragement of the general government."

Here, nothing in the terms of the 1875 Act restricts its application to rail lines constructed after its passage and, as just noted, its terms are indistinguishable from the right-of-way statute in *Alameda,* which this Court found applicable to preexisting roads. If the 1875 Act were not read to confirm rights-of-way of railroad lines previously constructed, lines constructed over the public lands prior to its passage and without the benefit of specific legislation might be in trespass, for petitioner has suggested no other basis by

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[3]The right-of-way statute at issue in *Alameda* was Section 8 of the Act of July 26, 1866, ch. CCLXII, 14 Stat. 253, 43 U.S.C. 932, which was also repealed by Section 706(a) of the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2793. It provided: "That the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."

which they could legitimatize their occupation of the public lands.[4] Yet, it cannot reasonably be supposed that Congress intended to open the public lands to unlimited future railroad construction while, at the same time, withholding its approval for those few rail lines that had already been constructed over the public lands.[5] Therefore, the court of appeals correctly held that a railroad company that had constructed its line over the public lands prior to 1875 could avail itself of the right-of-way benefits of the 1875 Act.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1981

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[4]It does not matter, in considerations of this possible consequence, that petitioner asserts its title to only a 67-foot wide strip of a 200-foot wide right-of-way and does not seek to displace the rail line itself.

[5]If owners of previously constructed lines could not obtain a right-of-way under the 1875 Act, they would have had no incentive to maintain or improve those lines, because they would have been trespassing on the public domain. Such a result would not be consistent with the Act's purpose of opening the West to development.

[6]As previously stated (pages 4-5, *supra*), the courts below did not reach the United States' contention that petitioner's claim against the United States was barred by the 12-year limitations period of the Quiet Title Act, 28 U.S.C. 2409a(f). In light of the disposition of this case by the courts below, there is no need to address that issue here.

DOJ-1981-02

No. 80-1016

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OCTOBER TERM, 1980

BOISE CASCADE CORPORATION,

Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY; SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner submits this Reply Brief to the Briefs in Opposition of the Union Pacific Railroad Company and San Pedro, Los Angeles & Salt Lake Railroad Company[1] and of the United States of America to respond to arguments raised for the first time in the Briefs in Opposition.

[1] The Respondent railroads will be referred to in this Reply Brief as the Railroad.

ARGUMENT

1. The Decision of the Court of Appeals Raises Important Questions of Federal Law.

The Railroad's Brief in Opposition attempts to portray the issues in this case as unique and archaic.[2]

The nature and extent of rights granted to railroads under the Act of March 3, 1875, 18 Stat. 482, 43 U.S.C. §§ 934-939 (the Act), is a regular subject of litigation.[3] One question raised in recent cases is whether the United States retains a reversionary interest if a railroad right of way across a school section is abandoned.[4] Although the Act of March 8, 1922, 42 Stat. 414, 43 U.S.C. § 912, seems to resolve that question in the negative except with respect to mineral reservations, it is raised here by the claim of the United States that it has reversionary and subsurface interests in the Railroad's claimed right of way.[5]

The legality and effect of disposition of all or a portion of a railroad's right of way by the railroad or the underlying fee owner is a subject of significant cur-

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[2] Railroad's Brief in Opposition at 6-7.

[3] In the brief time period involved in preparation of this Reply Brief, the following recent cases have been located. **Pollnow v. State of Wisconsin Department of Natural Resources**, 88 Wis.2d 350, 276 N.W.2d 738 (1979); **Zimmerman v. Union Pacific R. Co.**, Utah County District Court, Civil No. 44034 [filed March 18, 1976, judgment March 31, 1977 in favor of railroad]; **Allard Cattle Co. v. Colorado & Southern Ry. Co.**, 187 Colo. 1, 530 P.2d 503 (1974); **Berry Construction, Inc. v. City of Ontario**, San Bernadino Superior Court, Case No. CW 6446 [filed September 3, 1970 and dismissed based upon a settlement on March 8, 1973].

[4] **State of Wyoming v. Andrus**, 602 F.2d 1379, 1384 (10th Cir. 1979).

[5] United States' Brief in Opposition at 4.

rent interest.[6] The issue is presented here as a result of the Railroad's pattern of leasing portions of its right of way to adjacent landowners for non-railroad uses.

The questions presented in this case are worthy of this Court's consideration.

2. THE ACT IS NOT ANALOGOUS TO THE HIGHWAY RIGHT OF WAY ACT OF 1866.

The United States contends that *Central Pacific Ry. Co. v. Alameda County,* 284 U.S. 463 (1932), which held that the Act of July 26, 1866, ch. CCLXII, 14 Stat. 253, had retroactive application to secure a right of way to a highway constructed prior to its passage, supports the decision of the Court of Appeals in this case on retroactivity of the Act. The Brief in Opposition characterizes the terms of the two right of way acts as "indistinguishable." [7]

The Act of 1866, unlike the Act of 1875, was specifically intended to confirm preexisting interests and rights. Sections 9 and 10 of the Act expressly refer to actions undertaken "prior to" and "after passage of this act." [8] The legislative history of the Act of 1866 confirms its retroactive intent.

Senator Sherman of Ohio originally introduced a bill (S. No. 257) in April of 1866 to regulate the occu-

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[6] **Energy Transportation Systems, Inc. v. Union Pacific R. Co., 435 F.Supp. 313 (D.Wyo. 1977). Laiblin, "Insuring Abandoned Railroad Property," The Guarantor, January-February 1981 (Chicago Title Insurance Company).**

[7] **United States' Brief in Opposition at 7.**

[8] **A complete copy of the Act of 1866 is attached as Appendix A.**

pation of mineral lands and to extend the right of preemption to them. The bill was referred to the Committe on Mines and Mining which reported a totally amended bill some weeks later. Senators Stewart of Nevada and Conness of California led support of the bill through its passage in a form almost identical to the Act of 1866.[9]

During the debates, Senator Stewart described the intent of the bill as follows:

> It recognizes the obligation of the Government to respect private rights which have grown up under its tacit consent and approval . . . .
>
> . . . .
>
> . . . In short, it proposes no new system, but sanctions, regulates, and confirms a system to which the people are devotedly attached, and removes a cloud of doubt and uncertainty . . . .

Cong. Globe, 39th Cong. 1st Sess. 3227 (1866). Senator Conness added:

> This bill . . . proposes simply to confirm the title that the people themselves have established everywhere.

Id. at 3233. *See also, Id.* at 3234.

When S. No. 257 was passed, its name was amended to "A bill to legalize the occupation of mineral lands and to extend the right of preemption thereto." *Id.* at 3454. In order to circumvent opposition in the House,

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[9] Cong. Globe, 39th Cong. 1st Sess. 1844, 2851, 3225-3237, 3451-3454 (1866).

the Senate passed the bill again in the form of a complete amendment to H. R. No. 365, which had already passed the House. The House then passed the amended H. R. No. 365 as the Act of July 26, 1866.[10]

During the debates in the House just prior to passage of the Senate amendment, Representative Kasson of Iowa, who opposed the bill, noted that its object was:

> that security shall be given to the possessory titles and interests already vested, under no authority from the United States, but simply through the enterprise and irrepressible zeal which characterize the American people.

Id. at 4052. Representatives McRuer of California, Ashley of Nevada and Higby of California all confirmed that object. *Id.* at 4052-4054. Representative Higby summed up the purpose, stating:

The simplest proposition in the world is con-

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[10] After its passage in the Senate, S. No. 257 was referred to the Committee on Public Lands over the objection of Representatives from the Pacific Coast states. Id. at 3548. Representative Julian of Indiana, the Chairman of the Committee on Public Lands, opposed the bill and kept it in his Committee over the objection of a majority of the members of the Committee. Id. at 4053-4054. Representative Higby of California introduced an identical bill and secured its reference to the House Committee on Mines and Mining. Id. at 3843. Representative Higby had earlier introduced and secured passage of H.R. No. 365 which was an act granting the right of way to ditch and canal owners over the public lands. Id. at 1259, 1332, 3141-3142. When it became apparent to the California and Nevada delegations that Rep. Julian intended to use his position to block passage of S. No. 257 by the House, Senator Stewart's Committee on Public Lands reported a total amendment of H. R. No. 365 by substituting, after the title and enabling clause, S. No. 257. The Senate passed H. R. No. 365 as amended. Id. at 3916, 3951-3952. The House passed amended H. R. No. 365 a few days later just before the close of the Session. Id. at 4017, 4021, 4048-4054.

> tained in this bill. It is but one proposition, and that is to leave the whole mineral district as heretofore, only saying that what the Government has tolerated for fifteen or seventeen years shall now be legalized by the Government.

Id. at 4054.

Boise Cascade has already amply demonstrated that the Act of March 3, 1875 was intended to have prospective application only.[11] Therefore, *Central Pacific Ry. Co. v. Alameda County, supra,* is inapplicable to this case.

3. The Legality of the Railroad's Right of Way is Not In Issue.

The United States' Brief in Opposition suggests that this Court is compelled to find the Act retroactive or the Railroad's occupation of its right of way is illegal.[12] The argument of the United States ignores the fact that since 1905 the lands in question have not been public lands. The Railroad has plainly established a valid 66-foot right of way since 1905 even if one did not previously exist. Boise Cascade has never contended otherwise. Therefore, while the Railroad's rights prior to 1905 might be of some academic curiosity, they are plainly immaterial now. The United States raises the argument only out of concern that if the Railroad does not gain its right of way as a result of the Act, the United States has no subsurface or reversionary interests.

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[11] Petition for Writ of Certiorari at 7-11.

[12] United States' Brief in Opposition at 7-8.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[13] Boise Cascade has previously filed its Designation of Corporate Affiliates with the Court.

APPENDIX A

14 STATUTES AT LARGE 251, THIRTY-NINTH CONGRESS, FIRST SESSION, 1866.

CHAP. CCLXII. — *An Act granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for other Purposes.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States, and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States.

SEC. 2. *And be it further enacted,* That whenever any person or association of persons claim a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, or copper, having previously occupied and improved the same according to the local custom or rules of miners in the district where the same is situated, and having expended in actual labor and improvements thereon an amount of not less than one thousand dollars, and in regard to whose possession there is no controversy or opposing claim, it shall and may be lawful for said claimant or association of claimants to file in the local land office a diagram of the same, so extended laterally or otherwise as to conform to the local laws,

customs, and rules of miners, and to enter such tract and receive a patent therefor, granting such mine, together with the right to follow such vein or lode with its dips, angles, and variations, to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition.

SEC. 3. *And be it further enacted*, That upon the filing of the diagram as provided in the second section of this act, and posting the same in a conspicuous place on the claim, together with a notice of intention to apply for a patent, the register of the land office shall publish a notice of the same in a newspaper published nearest to the location of said claim; and shall also post such notice in his office for the period of ninety days; and after the expiration of said period, if no adverse claim shall have been filed, it shall be the duty of the surveyor-general, upon application of the party, to survey the premises and make a plat thereof, indorsed with his approval, designating the number and description of the location, the value of the labor and improvements, and the character of the vein exposed; and upon the payment to the proper officer of five dollars per acre, together with the cost of such survey, plat, and notice, and giving satisfactory evidence that said diagram and notice have been posted on the claim during said period of ninety days, the register of the land office shall transmit to the general land office said plat, survey, and description; and a patent shall issue for the same thereupon. But said plat, survey, or description shall in no case cover more than one vein or lode, and no patent

shall issue for more than one vein or lode, which shall be expressed in the patent issued.

SEC. 4. *And be it further enacted,* That when such location and entry of a mine shall be upon unsurveyed lands, it shall and may be lawful, after the extension thereto of the public surveys, to adjust the surveys to the limits of the premises according to the location and possession and plat aforesaid, and the surveyor-general may, in extending the surveys, vary the same from a rectangular form to suit the circumstances of the country and the local rules, laws, and customs of miners: *Provided,* That no location hereafter made shall exceed two hundred feet in length along the vein for each locator, with an additional claim for discovery to the discoveror of the lode, with the right to follow such vein to any depth, with all its dips, variations, and angles, together with a reasonable quantity of surface for the convenient working of the same as fixed by local rules: *And provided further,* That no person may make more than one location on the same lode, and not more than three thousand feet shall be taken in any one claim by any association of persons.

SEC. 5. *And be it further enacted,* That as a further condition of sale, in the absence of necessary legislation by Congress, the local legislature of any State or Territory may provide rules for working mines involving easements, drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent.

SEC. 6. *And be it further enacted*, That whenever any adverse claimants to any mine located and claimed as aforesaid shall appear before the approval of the survey, as provided in the third section of this act, all proceedings shall be stayed until a final settlement and adjudication in the courts of competent jurisdiction of the rights of possession to such claim, when a patent may issue as in other cases.

SEC. 7. *And be it further enacted*, That the President of the United States be, and is hereby, authorized to establish additional land districts and to appoint the necessary officers under existing laws, wherever he may deem the same necessary for the public convenience in executing the provisions of this act.

SEC. 8. *And be it further enacted*, That the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

SEC. 9. *And be it further enacted*, That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed: *Provided, however*, That whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the

public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

SEC. 10. *And be it further enacted*, That wherever, prior to the passage of this act, upon the lands heretofore designated as mineral lands, which have been excluded from survey and sale, there have been homesteads made by citizens of the United States, or persons who have declared their intention to become citizens, which homesteads have been made, improved, and used for agricultural purposes, and upon which there have been no valuable mines of gold, silver, cinnabar, or copper discovered, and which are properly agricultural lands, and the said settlers or owners of such homesteads shall have a right of pre-emption thereto, and shall be entitled to purchase the same at the price of one dollar and twenty-five cents per acre, and in quantity not to exceed one hundred and sixty-acres; or said parties may avail themselves of the provisions of the act of Congress approved May twenty, eighteen hundred and sixty-two, entitled "An act to secure homesteads to actual settlers on the public domain," and acts amendatory thereof.

SEC. 11. *And be it further enacted*, That upon the survey of the lands aforesaid, the Secretary of the Interior may designate and set apart such portions of the said lands as are clearly agricultural lands, which lands shall thereafter be subject to pre-emption and sale as other public lands of the United States, and subject to all the laws and regulations applicable to the same.